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No. 79-1020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DONALD NEWMAN,

Petitioner,

vs.

RICHARD J. ELROD, Sheriff of Cook County,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Illinois Appellate Court, First District is reported as *Donald Newman v. Richard J. Elrod*, Sheriff of Cook County, Illinois, 72 Ill. App. 3d 616, 391 N.E.2d 37 (1st Dist. 1979). The Supreme Court of Illinois denied the Petitioner's Leave to Appeal on October 1, 1979, reported at 76 Ill. 2d, October 17, 1979 advance sheet at p. xxvii (Docket No. 52291).

JURISDICTION

The jurisdictional requisites have been set forth in the Petition for a Writ of Certiorari. However, as treated more fully within the following argument the respondent does not believe that the petitioner has shown any good reason for this Court to exercise its sound discretion to grant his Petition.

QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari in a non-fugitive extradition cause where this Court has decided that the petitioner's Fourth Amendment rights are safeguarded where a probable cause determination has been made in the demanding state, and where both this Court's decisions and Illinois law forbid inquiry into the intent of the petitioner in performing the acts at issue especially where those acts are criminal in both the demanding and asylum states.

STATUTES INVOLVED

Ill. Rev. Stat. 1977, ch. 60, § 23 (Uniform Extradition Act § 6)

> Extradition of Persons Not Present in Demanding State at Time of Commission of Crime. The Governor of this State may also surrender, on demand of the Executive Authority of any other state, any person in this State charged in such other state in the manner provided in Section 3 with committing an act in this State, or in a third state, intentionally resulting in a crime in the state whose Executive Authority is making the demand.

New York Criminal Procedure Laws § 570.16 (McKenny's, 1971)

> The Governor of this State may also surrender, on demand of the Executive Authority of any other State, any person in this State charged in such other state in the manner provided in Section 3 with committing an act in this State, or in a third state, intentionally resulting in a crime in the state whose Executive Authority is making the demand when the acts for which extradition is sought would be punishable by the laws of this state, if the consequences claimed to have resulted therefrom in the demanding state had taken effect in this state; and the provisions of this article not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at that time of the commission of the crime, and has not fled therefrom; provided, however, that the governor of this state may, in his discretion, make any such surrender conditional upon agreement by the executive authority of the demanding state, that the person so surrendered will be held to answer no criminal charges of any nature except those set

forth in the requisition upon which such persons has been given reasonable opportunity to return to this state after his acquittal, if he shall be acquitted, or if he shall be convicted, after he shall be released from confinement. Nothing in this section shall apply to the crime of libel.

Rhode Island General Laws, 1956 § 12-9-8

The Governor of this State may also surrender, on demand of the Executive Authority of any other State, any person in this State charged in such other state in the manner provided in Section 3 with committing an act in this State, or in a third state, intentionally resulting in a crime in the state whose Executive Authority is making the demand when the acts for which extradition is sought would be punishable by the laws of this state, if the consequences claimed to have resulted therefrom in the demanding state had taken effect in this state; and the provisions of this chapter, not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom; provided, however, that the governor of this state may, in his discretion, make any such surrender conditional upon agreement by the executive authority of the demanding state, that the person so surrendered will be held to answer no criminal charges of any nature except those set forth in the requisition upon which such person is so surrendered, at least until such person has been given reasonable opportunity to return to this state after his acquittal, if he shall be acquitted, or if he shall be convicted, after he shall be released from confinement. Nothing in § 12-9-7 and § 12-9-8 shall apply to the crime of libel.

New Jersey Statutes 2 A § 96-7

No person, including a natural parent or parent by adoption, and no firm, corporation, association or agency approved to place children for adoption as provided by law, shall place, offer to place, or in any manner assist in the placement of a child in the home of any other person or persons for the purpose of adoption and, in so doing, take, receive or pay any money or anything of value, or undertake or discharge any financial obligation, except in connection with the birth and any illness of the child. Any person, including a natural parent or parent by adoption, and any firm, corporation, association or agency, other than an agency approved to place children for adoption as provided by law, violating this section, shall be guilty of a high misdemeanor.

Ill. Rev. Stat. 1977, ch. 4, § 12-1

No person and no agency, association, corporation, institution, society, or other organization, except a child welfare agency as defined by the "Child Care Act," approved July 10, 1957, as now or hereafter amended, shall request, receive or accept any compensation or thing of value, directly or indirectly, for placing out of a child.

Ill. Rev. Stat. 1977, ch. 4, § 12-5

Any person, agency, association, corporation, institution, society, or other organization violating the provisions of this Section shall be guilty of illegal placement of children and upon first conviction for an offense under this Act shall be guilty of a Class A misdemeanor; and upon conviction for any subsequent offense under this Act shall be guilty of a Class 3 felony.

STATEMENT OF THE CASE

Donald Newman was indicted in New Jersey, Indictment Number S-385-77, for Conspiracy to violate the adoption laws of New Jersey (N.J.S. 2A: 96-6, 2A: 96-7) in a three count indictment. (R. S4-4F) On August 19, 1977, the Governor of New Jersey requested that the Governor of Illinois extradite Donald Newman. (R. S1) On October 18, 1977, Governor James R. Thompson of Illinois issued a warrant for Donald Newman's arrest. (R. S warrant) On October 25, 1977, Donald Newman filed a Petition for Writ of *habeas corpus*. (R. C3)

At the hearing held on January 24, 1978, on the petition for *habeas corpus*, Assistant State's Attorney John Glenville offered into evidence the extradition warrant and rested the People's case. (R. 2) The petitioner's attorney, Daniel Webb, argued that Donald Newman was never in New Jersey, and argued that the Governor's warrant and underlying documents were not sufficient to establish the identity of that person as the relator since there is no indication of a middle name, address or even that the Donald Newman indicted was an attorney. (R. 3, 4) Mr. Webb concluded that the name Donald Newman on the papers, in and of itself, was not a sufficient showing of identity and stated that the evidence he offered rebutted the presumption of identity. (R. 5, 6)

Assistant State's Attorney Glenville responded that the Sheriff need not prove identity when the names are similar unless the relator submits proof to show otherwise, and relator has submitted no evidence to overcome the presumption. (R. 7) Mr. Glenville stated

that the court had heard absolutely no evidence that the relator was not the Donald Newman wanted in New Jersey. (R. 10, 11) Judge Schreier stated that he did not find Newman's evidence persuasive, and that the case law in Illinois as cited by Mr. Glenville authorizes the procedure employed by the People. (R. 11)

Mr. Webb then argued his second contention that the actions alleged to have been committed in Chicago "is perfectly legal under Illinois law;" placing a child privately for adoption is prohibited only in New Jersey. (R. 12, 13) Mr. Webb argued that under Section 23 [Uniform Criminal Extradition Act. § 6, as adopted in Illinois Chapter 60, § 23] a person must perform an act intentionally resulting in a crime in the other state, not inadvertently violating a law in New Jersey. (R. 13) Mr. Webb argued that Illinois has not defined "intentional" in the Act, but New York has and New York requires that the act performed also violate New York law. (R. 14) Mr. Webb concluded that what is alleged here is "not something that is commonly illegal." (R. 16)

Mr. Webb then called to testify Melvin R. Parnell, an attorney appointed as a guardian *ad litem* in adoption cases as an authority on adoption laws in Illinois over the objection of Assistant State's Attorney Glenville. (R. 16, 17) Mr. Parnell testified that every county in Illinois allows private adoption and attorneys receive fees for their services. (R. 20, 21)

Mr. Webb then argued that the warrant in front of the court must set forth the language "intentionally committed an act resulting" in a New Jersey crime and the warrant on its face has left out the word intentional and only states "perform an act in Illinois resulting in a crime in New Jersey." (R. 23, 24) Mr. Webb concluded

that an Illinois citizen should not be sent to New Jersey without intent being stated in the requisition papers and therefore the relator had overcome the presumption created by the introduction of the papers. (R. 28) Assistant State's Attorney Glenville then offered into evidence the supporting documents referred to by Mr. Webb. (R. 28) Mr. Glenville stated the government is considering all the papers as a whole. (R. 28, 29)

The trial court denied the petition for writ of *habeas corpus* and remanded the petitioner to the Sheriff to be delivered to New Jersey. (R. 30) The mittimus was stayed to file a notice of appeal and the present bond was ruled to stand. (R. 30)

On May 18, 1979, the Appellate Court of Illinois, First District rendered its opinion in this cause. The Appellate Court held that the trial court properly denied the petitioner's *habeas corpus* petition in that the extradition papers were sufficient on their face to support extradition and the presumption that the petitioner was the Donald Newman desired by New Jersey authorities was not rebutted.

The Appellate Court held that § 23 of the Illinois Extradition Act refers to individuals not in the demanding state at the time the offense occurred and that this differs from fugitive extradition. The Court found that the New York and Rhode Island provisions relied upon by the petitioner for his position that his actions must constitute a crime in the asylum state (Illinois), differed from the Uniform Act and Illinois' provision by specifically stating such a requirement. The Court also found that even though criminality in Illinois is not required for extradition, the petitioner's actions did constitute a crime in Illinois.

The Appellate Court stated that any consideration as to whether the petitioner intended his conduct to result in a crime in New Jersey would be improper for an asylum state court and relied upon this Court's decision in *Michigan v. Doran*, 439 U.S. 282, 99 S.Ct. 530 (1978). The Appellate Court then affirmed the trial court's actions in denying the *habeas corpus* petition.

The petitioner filed a Petition for Rehearing in the Appellate Court which was denied on June 21, 1979. The petitioner filed a Petition for Leave to Appeal to the Supreme Court of Illinois which was denied on October 1, 1979.

It is from the decision of the Illinois Appellate Court, after leave to appeal was denied by the Illinois Supreme Court, that the petitioner brings this petition for *certiorari*.

REASONS FOR DENYING THE WRIT OF CERTIORARI

CERTIORARI DOES NOT LIE FOR A NON-FUGITIVE EXTRADITION CAUSE WHERE THIS COURT HAS DECIDED THAT THE PETITIONER'S FOURTH AMENDMENT RIGHTS ARE SAFEGUARDED WHERE A PROBABLE CAUSE DETERMINATION HAS BEEN MADE IN THE DEMANDING STATE, AND WHERE BOTH THIS COURT'S DECISIONS AND ILLINOIS LAW FORBID INQUIRY INTO THE INTENT OF THE PETITIONER IN PERFORMING THE ACTS AT ISSUE ESPECIALLY WHERE THOSE ACTS ARE CRIMINAL IN BOTH THE DEMANDING AND ASYLUM STATES.

The petitioner seeks the granting of a writ of *certiorari* by this Court and claims that permitting his extradition to New Jersey for acts committed totally within Illinois and which constitute legal actions in Illinois is a violation of his Fourth Amendment rights (Pet. for Cert. at 11) The respondent maintains that the facts of this case neither permit the formulation, nor the resolution of the issue raised by the petitioner and moreover the respondent notes at the outset that a petition for writ of *certiorari* is improperly brought upon this basis. The petitioner has failed to show that the Illinois Appellate Court has decided this question in a way probably not in accord with applicable decisions of this Court. See Rule 19(1)(a) Supreme Court of the United States. Although the petitioner has completely failed to show the need for this Court, in its sound discretion, to grant his petition. The respondent, believing that the Illinois Appellate Court has properly determined this issue upon the merits will briefly address those merits.

The petitioner asks this Court to carve out a totally new body of law for non-fugitive extradition under § 6 of the Uniform Extradition Act. That is to require the asylum state court to determine probable cause for the charges extraditon is sought for and to determine whether those actions constituted a crime in the asylum state (Pet. for Cert. at 8, 9) This position is totally refuted by this Court's decisions and Illinois law. All authority cited by the petitioner to support this requirement is totally distinguishable and does not in fact support his position. This Court has held that the Extradition Clause of the United States Constitution was intended to enable each state to swiftly bring offenders to trial where a judicial determination of probable cause has been made by the demanding state. *Michigan v. Doran*, 439 U.S. 282, 99 S.Ct. 530 (1978).

The petitioner contends that § 23 (Ill. Rev. Stat. 1977, Ch. 60, § 23) requires that his actions intentionally resulted in a crime in the demanding state, and that these actions of the relator must constitute a crime in Illinois. The petitioner states that Donald Newman's actions were not criminal in Illinois thereby barring extradition and he relies on New York and Rhode Island law for this proposition. This Court's decisions have forbidden such an inquiry which must be limited solely to whether the demanding state made a finding of probable cause and whether the requisition papers were in order. *Michigan v. Doran.*

From the onset, the respondent maintains that criminality of actions under Illinois law is not a requirement for extradition. The only jurisdictions requiring such proof are New York and Rhode Island which have adopted very different statutes from that in Illinois. The

Illinois legislature in § 23 had adopted the exact language of the Uniform Criminal Extradition Act, § 6, and only that language.

The New York statute (N.Y. CPL § 570.16) after reciting the Uniform Act language states in addition:

> when the acts for which extradition is sought would be punishable by the laws of this state, if the consequences claimed to have resulted therefrom in the demanding state had taken effect in this state; (*Infra* at 3)

The Rhode Island statute (R.I. Gen. Laws § 12-9-8) also tacks on additional language after what constitutes the entire Illinois statute,

> when the acts for which extradition is sought would be punishable by the laws of this state, if the consequences claimed to have resulted therefrom in the demanding state had taken effect in this state; (*See Infra* at 4)

Therefore New York and Rhode Island specifically included language requiring the act to be a crime in their state. Forty-four other states have adopted the Uniform Extradition Act, and none have included the extra New York or Rhode Island language. Of these 44 other states, 42 of them have adopted the Uniform Criminal Extradition Act Sec. 6. Most of these states have adopted the exact language, and a few have adopted different language with the same substance. The Illinois Appellate Court specifically held that the Illinois statute did not contain this extra language contained in the Rhode Island and New York provisions and refused to interject that requirement into the Illinois statute.

Under the Illinois statute the requirement that the petitioner's actions constitute a crime in the State of Illinois

is not required to be shown at a *habeas corpus* proceeding. Had such a requirement been envisioned by the legislature, the New York and Rhode Island additional language would have been included. The only jurisdictions with case law requiring such a showing are New York and Rhode Island. The relator cites *In re Taylor*, 66 Misc. 2d 1006, 323 N.Y.S.2d 128 (S.Ct., 1971), which explicitly recognizes the difference between its statute and those in the rest of the nation.

> However, unlike this provision of the uniform law as it has been adopted in every other state, Section 834 (sec. 570.16) of the New York Code of Criminal Procedure imposes a condition precedent to the surrender of an accused person. It requires the acts for which extradition is sought would be punishable by the laws of this state . . . 66 Misc. 2d at 1009, 323 N.Y.S.2d at 132.

This case is not precedent for the application of this condition precedent in a state without the requirement in its statute. The requisition papers from New Jersey sustained the burden of proof under § 23 as required by Illinois law.

However, even though such a showing need not be made, Donald Newman's actions *do* constitute a crime in Illinois. The New Jersey indictment charges Donald Newman with conspiracy to commit a violation of N.J.S. 2A: 96-6 and 2A: 96-7 and alleges that he unlawfully received money $3,200, $6,000, $2,500, from the unnamed co-conspirators (R. S4A, 4B, 4C, 4D, 4E, 4F), receiving that money in Chicago by mail and in person.

N.J.S. 2A § 96-7 states, that no person may offer, assist or place a child for adoption and "in so doing, take, receive or pay any money or anything of value," Chapter 4, § 12-1 of the Illinois Revised Statutes (1977)

states that no person shall receive or accept any compensation or thing of value, directly or indirectly, for the placing out (adoption) of a child, and § 12-5 states, that any person violating § 12-1 is guilty upon first conviction of a Class A misdemeanor and upon subsequent conviction of a Class 3 felony.

These sections were interpreted in *People v. Schwartz*, 64 Ill. 2d 275, 356 N.E.2d 8 (1976), *cert. denied* 429 U.S. 1098 where the statute was found to be constitutional and not an infringement upon an attorney's ability to perform legal services where Spencer Schwartz, an Illinois attorney, received $6,500 for his services in regard to a private adoption. His actions were held to be encompassed by the Act and his conviction affirmed. The Illinois Appellate Court in the cause held that the defendant's actions as set forth in the indictment would constitute a crime in Illinois, citing *Schwartz*.

The actions of Donald Newman, as alleged in the indictments, in arranging adoptions and receiving sums of money for those arrangements in Chicago, does constitute a crime in Illinois. Newman could be prosecuted in Illinois for conspiracy to commit the crime or the crime itself. Extradition would therefore be warranted even *if* Illinois had a statute requiring the actions of the relator to constitute a crime in Illinois. Newman's actions therefore could not be interpreted other than intentionally resulting in a crime in New Jersey. The relator characterizes his actions as private placement of children for adoption which, he maintains, is legal in 43 states and Illinois and maintains at the hearing he established its legality. As shown above, mere private placement may or may not be unlawful in Illinois, but receiving compensaton for the placement in

the amount specified does not constitute proper legal fees and *is illegal*.

The petitioner cites *Ierardi v. Gunter*, 528 F.2d 929 (1st Cir. 1976), for the requirement that probable cause for the charge upon which extradiction is requested must be found at a *habeas corpus* proceeding and that under *Ierardi* the only correct meaning of § 6 (Illinois § 23) is that probable cause must be *inquired* into before extradition and probable cause constitutes whether the conduct is criminal in Illinois. *Ierardi*, does state that a probable cause determination is a prerequisite to interstate extradition, but holds that where a demanding state determines probable cause for the charges, the sanctuary state can rely on the determination of its sister state. *Ierardi* never equated probable cause as illegality in the sanctuary state and cannot be read to in any way reach that issue. In the instant cause, a New Jersey grand jury found probable cause for the charges and voted a true bill of indictment. That indictment accompanies the requisition papers and shows that probable cause has been determined for these charges.

The respondent argues that the word "intentionally" cannot be ignored in a determination of probable cause and that the Appellate Court improperly "blended" fugitive and non-fugitive extradition concepts in refusing to examine the underlying conduct. (Pet. for Cert. at 8, 9) The respondent relies upon this Court's opinion in *Michigan v. Doran*, 439 U.S. 282, 99 S.Ct. 530 (1978), to support his probable cause argument and contends that the Appellate Court improperly relied upon the decision in support of its refusal to examine the petitioner's conduct. The petitioner argues that *Michi-*

gan v. Doran requires that a determination of probable cause be made in the state where the conduct occurred and that Illinois never made such a determination. This Court in *Michigan v. Doran* stated that,

> In short when a neutral judicial officer of the demanding state has determined that probable cause exists, the Courts of the asylum state are without power to review the determination. 99 S.Ct. at 536.

The concurring opinion in *Michigan v. Doran*, considered the Fourth Amendment rights of the individual and held that where a determination of probable cause is made in the demanding state, the asylum state cannot probe the factual sufficiency of that finding.

The petitioner was indicted by a New Jersey Grand Jury for his actions performed in Illinois which caused private adoptions in New Jersey and which caused a breach of New Jersey law. Probable cause was thus determined by the demanding state, and this Court's requirements are satisfied. To extend this Court's holding in *Doran* to require the asylum state to render a second probable cause finding, totally distorts this Court's decision and the body of law upon which it is based.

The Appellate Court held that a consideration into whether the petitioner's conduct was intended to result in a crime elsewhere would be improper under the fugitive section of the act and relied upon *Michigan v. Doran*. It held that such consideration has been held improper in other jurisdictions under non-fugitive extradition statutes comparable to that in Illinois and relied upon *McCullough v. Darr*, 219 Kan. 477, 548 P.2d 1245 (1976) and *Conrad v. McClearn*, 166 Colo. 568, 445 P.2d 222 (1968). The Court's use of *Doran* was in fact proper.

In *Salazar v. Sandstrom*, 355 S.2d 145 (Fla. App. 3rd Dist. 1978), the court considered extradition of a Florida resident for his actions in Florida constituting a crime in Michigan under § 6 of the Uniform Extradition Act. The *Salazar* Court held that it would not concern itself with the legality of the criminal prosecution pending against the petitioner in the demanding state, and ordered extradition under fugitive extradition principles.

There is therefore no requirement under non-fugitive extradition law that probable cause must be *again* determined in the asylum state, and a "blending" or comparing of fugitive and non-fugitive extradition law is an acceptable and proper practice for asylum courts considering Uniform Act § 6 actions.

The Fourth Amendment is hardly violated by extradition of an Illinois resident whose acts in Illinois constituted a crime in both the demanding and asylum states and who received a probable cause determination by way of indictment in the demanding state. For all of the above stated reasons, the respondent urges that because the Illinois Appellate Court properly decided this issue on the merits, because the decision of the Illinois Appellate Court is in accord with decisions of this Court, and because the petitioner has failed to show any need for this Court to grant his petition for a Writ of *Certiorari*, such petition should be denied.

CONCLUSION

The respondent, Richard J. Elrod, Sheriff of Cook County, respectfully requests that the petition for a writ of certiorari be denied.

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